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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940

No. 983

DOROTHY BRUNET,
Petitioner,

vs.

S. S. KRESGE COMPANY, a corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

and

BRIEF IN SUPPORT THEREOF.

SAMUEL A. RINELLA,
Counsel for Petitioner.

HARRY G. FINS,
JOSEPH BARBERA,
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940

No.

DOROTHY BRUNET,

Petitioner,

vs.

S. S. KRESGE COMPANY, a corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

Your petitioner, DOROTHY BRUNET, represents to this Honorable Court as follows:

SUMMARY STATEMENT OF THE MATTER INVOLVED.

An action was brought by the petitioner, a citizen of the State of Illinois, against the respondent, a citizen of the State of Michigan, in the District Court of the United States for the Northern District of Illinois, East-

ern Division, to recover damages in the sum of Ten Thousand ($10,000.00) Dollars for personal injuries to the plaintiff, occasioned by the negligence of the respondent in negligently causing and allowing the stairway in the respondent's store to become and remain in a slippery and dangerous condition, in that certain accretions of ice, water, snow and slush were allowed to remain on the stairway for a long period of time. (R. 2 and 3.)

Nine witnesses testified on behalf of the petitioner, and five witnesses testified on behalf of the respondent, and there was a conflict in the evidence as to the question of negligence and contributory negligence. (Brief, pages 7-11.) At the close of all the evidence, the respondent made a motion for a directed verdict, which motion the trial court denied without reservation (R. 124.) The jury brought in a verdict in the sum of Five Thousand ($5,000.00) Dollars. (R. 131.) The respondent made a motion for a new trial and for judgment notwithstanding the verdict, which motions were denied by the trial court. (R. 132-135.) The trial court then entered judgment on the verdict. (R. 136.)

The respondent appealed to the United States Circuit Court of Appeals for the Seventh Circuit and that Court reversed the judgment with directions to the District Court "to dismiss on the merits." (R. 155.)

REASONS RELIED ON FOR GRANTING OF CERTIORARI.

I.

The entry of the order by the United States Circuit Court of Appeals for the Seventh District, directing the trial court to enter an order dismissing the proceedings on the merits was a denial to the petitioner of her right to trial by jury as guaranteed by the Seventh Amendment of the Constitution of the United States. (Brief, p. 12.) This question is of great importance, and, your petitioner believes, warrants a review by the Supreme Court of the United States.

II.

The United States Circuit Court of Appeals for the Seventh Circuit construed Rule 50 (b) of the Federal Rules of Civil Procedure so as to override the Seventh Amendment of the Constitution of the United States, which construction is directly contrary to the law as expounded by the Supreme Court of the United States in *Slocum* v. *New York Life Insurance Co.*, 228 U. S. 364, and *Aetna Insurance Co.* v. *Kennedy*, 301 U. S. 389. (Brief, pp. 12-14.) The interpretation of Section 50 (b) of the Federal Rules of Civil Procedure has been a difficult problem in many Federal Courts and has recently come to the attention of this Honorable Court on several occasions. In the case of *Conway* v. *O'Brien*, 61 S. Ct. 634, 85 L. Ed. 574 and in the case of *Berry* v. *United States*, 61 S. Ct. 637, 85 L. Ed. 576 (both cases decided by this Court on March 3, 1941, but official citations are not yet available), this Honorable

Court granted Writs of Certiorari to the United States Circuit Court of Appeals for the Second Circuit for the purpose of construing Section 50 (b) of the Federal Rules of Civil Procedure regarding problems similar to that presented by the case at bar. However, in both of the above cited cases this Honorable Court reversed the Circuit Court of Appeals for the Second Circuit on other grounds and, therefore, found it unnecessary to interpret Section 50 (b). The application of this section, in so far as it affects the power of the Circuit Courts of Appeal to deny a litigant a new trial, is still a dilemma to the Federal Courts, and, your petitioner believes, the situation warrants the granting of a Writ of Certiorari in the case at bar because of its importance.

III.

The United States Circuit Court of Appeals, in its decision, did not follow the common law of the State of Illinois as enunciated by the Supreme Court of the State of Illinois, in accordance with the holding of this Honorable Court in the case of *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64. In deciding upon the questions of negligence and contributory negligence, the United States Circuit Court of Appeals for the Seventh Circuit has thrown the local law of Illinois in a state of confusion by following a case which was decided by one of the four Appellate Courts of Illinois instead of following the law as decided by the Supreme Court of Illinois. (Brief, pp. 14-17.) In this connection, your petitioner wishes to call the attention of this Honorable Court to the fact that the four Illinois Appellate Courts are tribunals of intermediary appellate jurisdiction and that the Supreme Court of Illinois is the highest court of last resort in the State.

JURISDICTION.

The judgment of the United States Circuit Court of Appeals for the Seventh Circuit was entered on November 1, 1940. (R. 155.) The petition for rehearing of the petitioner was denied by the United States Circuit Court of Appeals for the Seventh Circuit on November 29, 1940. (R. 158.) A stay of mandate for a period of ninety (90) days was granted by the United States Circuit Court of Appeals for the Seventh Circuit on December 19, 1940. (R. 162.) On the 17th day of February, 1941, an order was entered by the Supreme Court of the United States, as follows (R. 163):

> "Upon Consideration of the application of counsel for the Petitioner,
>
> It Is Ordered that the time for filing petition for certiorari be, and the same is hereby, extended to, and including, 28th day of April, 1941,
>
> It Is Further Ordered that the mandate of the Circuit Court of Appeals be stayed providing a petition for certiorari is filed by the 28th day of April, 1941. Should such a petition be filed by such date then this stay of the mandate to continue pending final disposition of the case by this Court.
>
> /S/ Frank Murphy,
> Associate Justice of the Supreme Court of the United States."

The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, as amended by the Act of February 13, 1925. (28 U. S. C. A. Section 347.)

PRAYER.

Wherefore, your petitioner, Dorothy Brunet, prays this Honorable Court to issue a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit, commanding the said United States Circuit Court of Appeals for the Seventh Circuit to transmit the record in No. 7283 of said court, entitled *Dorothy Brunet, plaintiff-appellee* v. *S. S. Kresge Company, a corporation, defendant-appellant,* to this Court to be reviewed by this Honorable Court, and upon such a review the judgment of the United States Circuit Court of Appeals for the Seventh Circuit be reversed and remanded to that Court with instructions to proceed in accordance with the views of this Honorable Court.

DOROTHY BRUNET,
Petitioner.

SAMUEL A. RINELLA,
Chicago, Illinois,
Counsel for Petitioner.

HARRY G. FINS,
JOSEPH BARBERA,
Chicago, Illinois,
Of Counsel.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINIONS OF COURTS BELOW.

The Judge of the District Court of the United States for the Northern District of Illinois, Eastern Division, did not render an opinion. The opinion of the United States Circuit Court of Appeals for the Seventh Circuit appears on pages 151-154 of the Transcript of the Record and is reported in 115 Fed. (2) 713. The opinion of the Circuit Court of Appeals for the Seventh Circuit on petition for rehearing appears on pages 156-158 of the Transcript of the Record and is reported in 115 Fed. (2) 713, at pages 715-716.

ERRORS TO BE URGED.

1. The United States Circuit Court of Appeals for the Seventh Circuit erred in reversing the judgment of the District Court for the Northern District of Illinois, Eastern Division, which judgment was based upon the verdict of a jury.

2. The United States Circuit Court of Appeals for the Seventh Circuit erred in remanding the case to the District Court for the Northern District of Illinois, Eastern Division, with instructions to "dismiss on the merits."

STATEMENT OF THE CASE.

The respondent, S. S. Kresge Company, maintained a retail store at the corner of 63rd and Halsted Street in the City of Chicago. The store is a large one and con-

sists of two sales floors, the basement, the first or main floor and the stockroom on the second floor. Leading from the main first floor to the basement were stairs, the steps of which were made of smooth marble (R. 7, 10, 19, 31, 61, 66, 87) and had no covering or mat of any kind on them. (R. 9, 16, 31, 60.) The stairs were divided into two parts with brass rails running down the center as shown in Respondent's Exhibits 1, 2 and 3. (R. 89.) There were also hand rails on either side for persons going up or down the stairs. The store is large, and during the noon hour of a day such as the day on which the petitioner was injured, February 21, 1931, an average of two thousand persons came in and went out of the store. (R. 104.)

The petitioner fell about 11:45 a. m. (R. 6, 29, 39.) As the petitioner started to descend the stairway, she had hold of the banister rail with her right hand, and as she got down two or three stairs she noticed that the stairs were very slippery and she held onto the banister and proceeded down. (R. 39.) When she got down four or five stairs and just as she was stepping on one of the stairs her foot slipped out from under her, and she was unable to brace herself and slipped as a result of the wet and melted snow on the stairs and the slippery condition of same, causing her to slide down the stairway to the landing below. (R. 39-40.) At the time of the fall the steps were slippery, sloppy, slushy, very wet, and they seemed very waxy and sort of greasy like. (R. 9, 11, 30, 50, 52, 60.) The entire stairway of twenty or twenty-two steps was in the same condition as described. (R. 32, 60.) One of petitioner's witnesses who went in the store between 10:30 and 11 a. m. (R. 24) found the steps at that time wet, slushy and very slippery. (R. 25.) In fact, the stairs were then so slippery that this witness slipped at about the second step (R. 25, 27) as she was going down. Another of petitioner's witnesses went down the steps

about 11:15 a. m. (R. 14) and found them muddy, slushy and very slippery, as though they had a high polish. (R. 15.) Two witnesses happened to be at the foot of the stairs for about one-half hour before the petitioner fell. (R. 7, 59.) One of these witnesses, Hazel Brown, went down the steps about 11 a. m. (R. 60) and found the stairs at that time awfully slippery, waxy and a lot of mud and water on them. (R. 60, 66.) As she went down the stairs, she slipped because of the condition described. (R. 60.) This witness further testified that she couldn't tell whether the steps were slippery until she stepped on them. (R. 66.) When Hazel Brown returned to the foot of the stairway and met her friend, Mrs. Frayne, one-half hour before the petitioner fell, the steps were still in the same condition as they were when she descended. (R. 60, 66.) During the one-half hour prior to the fall that Mrs. Brown and her friend were at the foot of the stairway, nobody cleaned or mopped the steps (R. 9, 60), although Mrs. Frayne saw two other people slip on the steps before the occurrence in question. (R. 13.) This testimony with reference to respondent's failure to clean the steps was contradicted by respondent's employee, Jesse Grigsby, who testified for respondent that he mopped the stairway about fifteen minutes before the petitioner fell (R. 96) and between the hours of 11 and 11:30 a. m. (R. 99.) This witness also testified that he looked at the stairs at 11:10 or 11:15 a. m. at the request of Mr. Landis, his superior, and didn't do anything because the stairs were in good condition. (R. 99.) Mr. Landis, however, admitted on cross-examination that when he saw the steps at about ten minutes of eleven a. m., they were in such condition that he knew they needed mopping. (R. 85.) These two witnesses of respondent further contradicted each other in that Fred Landis, respondent's assistant manager, testified that he first saw the porter, Mr.

Grigsby, at 8 a. m. on the morning in question, washing the 63rd Street door, and at that time gave him instructions to keep the stairs and floor clean. (R. 83.) Grigsby, however, testified that he generally started work about 11 a. m. (R. 95) and that on the morning in question, he saw Landis at about 11:15 or 11:10 a. m. (R. 98, 99.) At the time petitioner fell, the steps were slushy, wet and muddy with dirty, melted snow on them and waxy, slippery and sort of greasy. (R. 30, 40, 52.) The stairway in question was inside the store proper and about twelve (12) feet from the nearest street entrance. (R. 77.)

With reference to petitioner's injuries, the record shows that when petitioner slid down the stairs, her head struck the first or second step from the bottom with a crash that made a noise like a jar bursting (R. 30, 59), and she was knocked unconscious (R. 8, 30, 39, 60) and remained in that condition a couple of minutes. (R. 60.) She was picked up by some man immediately after the fall and carried to the elevator (R. 8, 30, 40, 59), not regaining consciousness until after she was in the elevator. (R. 40.) When Dr. Coopersmith examined petitioner the day after the fall, he found a swelling of the back of the head about the size of a half dollar, the muscle extending from back of the ear, neck and down to the collar bone was swollen and bruised, there was a swelling at the tail bone of the spine, and bruises and swelling of the chest. (R. 54.) After the injury, she vomited liquids and food about three or four times a day. (R. 55.) Petitioner suffered continually with her head. She had no strength in her back and was very nervous. She suffered from headaches several times a week, which would sometimes last two or three days. (R. 44-45.) In December, 1939, Dr. Coopersmith advised petitioner to quit work because of her nervousness and loss of strength, which in the treating

physician's opinion was due to the fall. (R. 56.) At the time of the trial, nearly one year after the fall, petitioner was still not working and still under the physician's care (R. 44), seeing him about twice a month for examination and treatment. (R. 56.) Dr. Snitman, who testified as an expert, and whose qualifications were admitted by respondent (R. 67), stated that her condition of health, as above described, would be permanent. (R. 71.) With the exception of being off two or three days (R. 46), petitioner had worked steadily for four years prior to the fall in question and was never troubled with headaches or extreme nervousness before this injury. (R. 45.) No testimony was offered by respondent refuting any of the medical features of the case.

ARGUMENT.

I.

The order of the Circuit Court of Appeals to dismiss on the merits was contrary to the Seventh Amendment of the Constitution of the United States.

The order of the Circuit Court of Appeals to dismiss on the merits was directly contrary to the case of *Slocum* v. *New York Life Insurance Co.*, 228 U. S. 364, 33 S. Ct. 523, 57 L. Ed. 879, Ann. Cas. 1914 D, 1029, and *Aetna Ins. Co.* v. *Kennedy*, 301 U. S. 389, 57 S. Ct. 809, 81 L. Ed. 1177. In the *Slocum* case the Supreme Court of the United States held that, by virtue of the Seventh Amendment of the Constitution of the United States, a Court of Appeals may not order the dismissal of a cause which was tried by a jury, but it may only remand for a new trial. The same was held in the *Aetna Ins. Co.* case. The United States Court of Appeals for the Seventh Circuit entered an order directing the dismissal of the petitioner's cause on the merits without granting her a new trial, thus depriving her of a trial by jury as guaranteed by the Seventh Amendment of the United States Constitution.

II.

Rule 50 (b) of the Federal Rules of Civil Procedure may not be interpreted to override the Seventh Amendment of the Constitution of the United States.

The cases of *Slocum* v. *New York Life Insurance Company*, 228 U. S. 364, and *Aetna Ins. Co.* v. *Kennedy*, 301 U. S. 389, were called to the attention of the United States

Circuit Court of Appeals for the Seventh Circuit by your petitioner in her petition for rehearing which she filed in the Circuit Court of Appeals. That Court, however, relied on Rule 50 (b) of the Federal Rules of Civil Procedure which provides: "Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion". The Circuit Court of Appeals said in its opinion (at 115 Fed. (2) page 716): "Without the new Rule, this would undoubtedly bring the case within the purview of the Slocum case, and we would be required to remand for new trial." We submit to this Honorable Court that if Rule 50 (b) of the Federal Rules of Civil Procedure is to be interpreted so as to give a Federal reviewing court the power to dismiss a cause instead of remanding it for a new trial—a power which it did not have at common law—then this rule would, in effect, override the Seventh Amendment to the Constitution of the United States. This, no doubt, was not the intention of the Supreme Court of the United States in framing the Federal Rules of Civil Procedure. Furthermore, such an interpretation would give the Federal reviewing court authority which it did not have prior to the passage of the Rules, and it is quite evident that it was not the intention of the Supreme Court of the United States to extend the jurisdiction of the Circuit Courts of Appeal by the passage of the Federal Rules of Civil Procedure.

The opinion of the United States Circuit Court of Appeals for the Seventh Circuit relies on the case of *Baltimore & Carolina Line* v. *Redman*, 295 U. S. 654, 55 S. Ct. 890, 79 L. Ed. 1636. It is to be noted that the *Redman* case is dissimilar to the case at bar. In the *Redman*

case the ruling on the motion for a directed verdict had been expressly reserved by the court until after verdict when the court ruled on the sufficiency of the evidence, whereas in the case at bar no such reservation was made and the court unconditionally denied the motion of the defendant for directed verdict before the case was submitted to the jury. If Rule 50 (b) of the Federal Rules of Civil Procedure is to be interpreted to grant the Circuit Courts of Appeals the power to remand without granting a new trial, then that rule would in effect change the common law method of trial by jury and thus override the Seventh Amendment of the Constitution of the United States. Such interpretation would be contrary to the meaning that was intended for the rule and would make the rule unconstitutional.

III.

The Circuit Court of Appeals for Seventh Circuit interpreted the local law of Illinois contrary to the decisions of the Supreme Court of Illinois.

The case at bar was tried in the District Court of the United States for the Northern District of Illinois, Eastern Division. It was, therefore, the duty of the Circuit Court of Appeals for the Seventh Circuit, in accordance with the holding in *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64, to follow the law of Illinois as promulgated by the Supreme Court of Illinois, which is the highest court of that State.

The law of negligence in the maintenance of stairways was declared by the Supreme Court of Illinois in the case of *I. C. Railroad Co.* v. *Keegan,* 210 Ill. 150, wherein the Court, at page 156, said:

"* * * It was the duty of the appellant to use reason-

able care to keep the said stairway in a reasonably safe condition, and in view of the evidence heretofore referred to, the questions whether it used such reasonable care and what was the condition of the steps at the time of the injury were questions of fact for the jury. The fact that the appellant had men present whose duty it was to remove the slush, snow and ice from the steps would not excuse it for a failure to keep the stairway in a reasonable safe condition for use by persons seeking to take passage upon its trains, if such employees failed and neglected to use due diligence to remove the slush, snow and ice deposited upon said steps. The trial court did not err in declining to take the case from the jury, but properly left to them the question whether the appellant used proper diligence to keep said steps in a reasonably safe condition under the circumstances as disclosed by the evidence."

As to the law of contributory negligence, the Supreme Court of Illinois, in the comparatively recent case of *Blumb* v. *Getz,* 366 Ill. 273, at page 277, said:

> "The question of contributory negligence is one which is preeminently a fact for the consideration of a jury. It can not be defined in exact terms and unless it can be said that the action of a person is clearly and palpably negligent, it is not within the province of the court to substitute its judgment for that of a jury which is provided for the purpose of deciding this as well as the other questions in the case. As was stated in *Thomas* v. *Buchanan,* 357 Ill. 270: 'The question of due care on the part of the plaintiff's intestate is always a question of fact to be submitted to a jury whenever there is any evidence in the record which, with any legitimate inference that may reasonably and legally be drawn therefrom, tends to show the exercise of due care on the part of the deceased.' "

The Circuit Court of Appeals for the Seventh Circuit followed the case of *Murray* v. *Bedell Co.,* 256 Ill. App. 247, which was decided by one of the four Appellate Courts of Illinois. This Appellate Court decision is in conflict with the decisions of the Supreme Court of Illinois. We call this

Honorable Court's attention to the fact that the four Appellate Courts of Illinois are tribunals of intermediary appellate jurisdiction and that the Supreme Court of Illinois is the highest court of last resort in the State. Under the decision of *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64, it was the duty of the United States Circuit Court of Appeals for the Seventh Circuit to follow the law of the Supreme Court of Illinois and not of the Appellate Courts of Illinois.

Furthermore, the Circuit Court of Appeals for the Seventh Circuit not only failed to follow the common law as announced by the Supreme Court of Illinois, but it also failed to follow the law of negligence and contributory negligence as announced by the Supreme Court of the United States. This Honorable Court, in *The Richmond & Danville R. R. Co.* v. *Powers,* 149 U. S. 43, 45, said:

> "It is well settled that where there is uncertainty as to the existence of either negligence or contributory negligence, the question is not one of law, but of fact, and to be settled by a jury; and this, whether the uncertainty arises from a conflict in the testimony, or because the facts being undisputed, fair-minded men will honestly draw different conclusions from them."

This Court said in *Kreigh* v. *Westinghouse, C. K. & Co.,* 214 U. S. 249, 258:

> "Questions of negligence do not become questions of law to be decided by the court, except 'where the facts are such that all reasonable men must draw the same conclusion from them, and the case is not to be withdrawn from the jury unless the conclusion follows as matter of law that no recovery can be had upon any view which can be properly taken of the facts the evidence tends to establish'. *Gardner* v. *Michigan C. R. Co.,* 150 U. S. 349, 361, 37 L. ed. 1107, 1110, 14 Sup. Ct. Rep. 140."

This Court said in *Dimick* v. *Schiedt*, 293 U. S. 474, 486:

> "Maintenance of the jury as a fact finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care."

CONCLUSION.

It is respectfully submitted that the errors of the United States Circuit Court of Appeals for the Seventh Circuit above discussed are of such importance as to call for review and determination by this Honorable Court.

Respectfully submitted,

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Counsel for Petitioner.

HARRY G. FINS,
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Chicago, Illinois,
Of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1945

No. [redacted]

DOROTHY SHELLEY,

vs.

S. S. KRESGE COMPANY, A corporation,

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CARL E. ABRAHAMSON,
Counsel for Respondent.

BURT A. CROWE,
Of Counsel.

BARNARD & MILLER, 19 S. MAIN ST., CLARENCE, NEW YORK, 1945

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940

No. 983

DOROTHY BRUNET,

Petitioner,

vs.

S. S. KRESGE COMPANY, a corporation,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Respondent, S. S. Kresge Company, a corporation, represents unto this Honorable Court as follows:

I.

The statement of the matter involved as set out by Petitioner in her brief filed herein correctly states the salient facts as to the cause of action herein. Counsel for

Petitioner has, however, misquoted some of the proceedings as set out in the second paragraph of Page 2 of their Petition. In this statement Petitioner states that at the close of all the evidence the Respondent made a motion for a directed verdict which motion the court denied *without reservation.* This is incorrect. In the transcript of record, Page 130, appears the defendant, S. S. Kresge Company's written motion for an instructed verdict of not guilty on which appears, written by the Trial Court in his handwriting, (Written notation) "Ruling Reserved." Following the verdict by the jury, the defendant below, S. S. Kresge Company, filed its written motion to set aside the verdict and to grant a new trial (R. 132-133). In that motion points were made that the Court erred in overruling the motion of the defendant to withdraw the evidence from the jury and refusing to find the defendant not guilty at the close of the plaintiff's evidence. A similar point was made that the Court erred in overruling the motion at the close of all the evidence. Points were also made (R. 133) that the plaintiff was guilty of contributory negligence as a matter of law and that the evidence failed to show any negligence on the part of the defendant. These same points were also raised in the defendant, S. S. Kresge Company's motion for a judgment for the defendant notwithstanding the verdict (R. 134-135).

As stated by counsel for Petitioner upon an appeal to the United States Circuit Court of Appeals for the Seventh Circuit, the judgment of the court below was reversed with directions to the District Court "to dismiss on the merits".

ANSWER OF RESPONDENT TO REASONS RELIED UPON BY PETITIONER FOR GRANTING OF CERTIORARI.

Following the opinion of the United States Circuit Court of Appeals for the Seventh Circuit, the plaintiff below and Petitioner here, filed a petition for rehearing (115 Fed. (2nd) 713), wherein it was contended that error had been committed by that court in directing that the court below dismiss the suit on the merits. The contentions made by Petitioner herein are answered by the United States Circuit Court of Appeals for the Seventh Circuit in 115 Fed. (2nd) 716, wherein the court calls attention to two cases mentioned by Petitioner, namely, *Slocum* v. *New York Life Insurance Co.*, 228 U. S. 364, and *Aetna Insurance Co.* v. *Kennedy*, 301 U. S. 389. It will be noted that the Circuit Court of Appeals indicated that in the *Slocum* case this Court laid down the very general rule that in case of the reversal of a judgment entered on a verdict which the Appellate Court found should be vacated for insufficiency of evidence to support it, the direction of the Appellate Court should be for a new trial rather than for the entry of a judgment for the defendant notwithstanding the verdict.

This rule was subsequently modified by this Court in *Baltimore & Carolina Line* v. *Redman*, 295 U. S. 654. This Court based its express modification of the earlier ruling on a distinction which it found between the two cases in that in the earlier case there had been *no reservation of the ruling* on a motion for a directed verdict, whereas in the *Redman* case the ruling had been *expressly reserved* until after verdict when the court ruled on the sufficiency

of the evidence. This Court held that this presented a question of law rather than a question of fact and held that the Circuit Court of Appeals for the Second Circuit was in error in remanding for a new trial instead of directing dismissal of the cause on the merits.

These cases decided by this Court were apparently distinguishable because of the fact that the ruling had not been reserved by the Trial Court until after the return of the verdict. We have herein called this Court's attention to the misstatements of counsel for Petitioner in saying that the Trial Court denied the motion of the S. S. Kresge Company for a directed verdict *without reservation.* Such is not the fact but on the contrary the Court specifically wrote in long-hand "Ruling Reserved" (R. 130).

The United States Circuit Court of Appeals for the Seventh Circuit called attention to the adoption of new Federal Rules of Civil Procedure, 28 U.S.C.A., Section 723c, which the court stated had, in effect, done away with the distinction between the cases above cited as to whether or not there was an express reservation of ruling. Rule 50 (b) provides:

> "Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict * * * . A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen

> the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. * * *"

The United States Circuit Court of Appeals for the Seventh Circuit not only followed this rule of civil procedure above quoted, but without it would have been correct in its direction to the Trial Court below since the ruling for a directed verdict below was denied and such ruling was expressly *reserved.*

In view of the foregoing decisions and rules of this Court, we contended then and do now that this defendant reserved its rights under said rule and under said decisions and was entitled to a dismissal of the case on the merits. In the *Redman* case this Court held under this same situation:

> "Whether the evidence was sufficient or otherwise was a question of law to be resolved by the Court. * * * The Court of Appeals held that the evidence was insufficient to support the verdict for the plaintiff; that the defendant's motion for a directed verdict was accordingly well taken; and therefore that the judgment for the plaintiff should be reversed. Thus far we think its decision was right. The remaining question relates to the direction which properly should be included in the judgment of reversal. It results that the judgment of the Court of Appeals should be modified by substituting a direction for a judgment of *dismissal on the merits* in place of the direction for a new trial and, as so modified, should be affirmed."

II.

Petitioner's reason No. III on page 4 of the Petition contends that the United States Circuit Court of Appeals for the Seventh Circuit in its decision did not follow the common law of the State of Illinois and calls attention to the fact that the four Illinois Appellate Courts are tribu-

nals of intermediary appellate jurisdiction and that the Supreme Court of Illinois is the highest court of last resort in the state.

In Petitioner's argument the contention is made that the Circuit Court of Appeals for the Seventh Circuit followed the case of *Murray* v. *Bedell Co.*, 256 Ill. App. 247, and that under the case of *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64 it was the duty of that Court to follow the Supreme Court of Illinois and not the Appellate Court of Illinois.

This statement and contention is incorrect. There once was a statute in Illinois giving certain legal effect to Appellate Court decisions. This statute has long since been repealed. A reading of the decision of the Circuit Court of Appeals in this case, 115 Fed. (2d) 713-715 clearly indicates and shows that that Court did not rely upon Appellate Court decisions alone. In its decision the Court called attention to the similarity of facts as shown in the Appellate Court case of *Murray* v. *Bedell Co.* and stated:

> "This conclusion is consistent with the general rule, as stated by the Illinois Supreme Court in *Calvert* v. *Springfield Light Co.*, 231 Ill. 290; 83 N. E. 184-185; 14 L. R. A. (N. S.) 782; 12 Ann. Cas. 423"

and then quoted from the Calvert case as applicable and controlling in the case at bar.

BRIEF OF RESPONDENT.

ARGUMENT.

Counsel for Petitioner urge two points in support of the Petition for certiorari. First, that the United States Circuit Court of Appeals for the Seventh Circuit erred in reversing the judgment of the District Court for the Northern District of Illinois, Eastern Division, which judgment was based upon the verdict of a jury and second, that the United States Circuit Court of Appeals erred in remanding the case to the District Court with instruction to "dismiss on the merits".

In Petitioner's brief a statement of the facts of the case is set out (Pages 7-11). However, the facts are not abstracted fully enough so that this Court may readily determine the basis for the Circuit Court of Appeals in reversing the judgment entered below and directing that the suit be dismissed on its merits. The plaintiff was a customer in the defendant's store. The store was a large one consisting of two sales floors, a basement and the first and second floor. Leading from the main first floor to the basement were stairs, the steps of which were a composition of terrazo with an abrasive mixed in (Rec. 103). The stairs were divided into two parts with brass rails running down the center (Rec. 89). There were also hand rails on either side for persons going up or down the stairs. The store is a large one and during the noon hour such as on the day of the accident, an average of two thousand people came in and went out of the store daily (Rec. 104). The plaintiff, Dorothy Brunet, with a friend, entered the store at the noon hour intending to

have lunch. It was snowing outdoors and plaintiff had rubber galoshes on (Rec. 39); they descended the stairs to the basement. Plaintiff had hold of the banister rail with her right hand and as she got down two or three stairs she noticed that the stairs were very slippery and she held onto the banister and proceeded down (Rec. 39). When she got down four or five stairs and just as she was stepping on one of the stairs her foot slipped out from under her, she was unable to brace herself and she slid down the stairs to the landing. Plaintiff testified the stairs were wet and muddy, had dirty melted snow on them and that they were very slippery to walk on and in response to a direct question testified that the cause of her slipping was "the slipperiness of the stairs and the wet and melted snow on the stairs" (Rec. 40).

Petitioner complains of the Circuit Court of Appeals and seeks to base her complaint on the ground that the Circuit Court of Appeals for the Seventh Circuit was obliged to follow the law of Illinois as promulgated by the Supreme Court of Illinois but failed in this and rather followed the opinion of one of the Appellate Courts of Illinois, namely in the case of *Murray* v. *Bedell Co.*, 256 Ill. App. 247.

A reading of the opinion of the Circuit Court of Appeals, 115 Fed. (2d) 713-715, clearly shows that such is not the fact. The court concluded that:

> "After a careful reading of the record in this case, we are convinced that it does not disclose such negligence on the part of appellant, and freedom from negligence on the part of appellee, as to justify the judgment entered in favor of the latter, and that appellant's motion for directed verdict should have been sustained."

The court comments from two Illinois Appellate Court

decisions, then quotes from the testimony of the plaintiff, saying:

> "From the testimony of the plaintiff it is apparent that the danger, if any, was clearly evident to her, as well as the defendants, and that she was aware of the condition and of the possibility of sustaining a fall before she undertook to pass over and along the floor space of the vestibule."

The court cited further from the Illinois Appellate cases and concluded by saying:

> "This conclusion is consistent with the general rule, as stated by the Illinois Supreme Court in *Calvert* v. *Springfield Light Co.*, 231 Ill. 290."

Petitioner's argument seems to be that all questions of negligence and contributory negligence must be decided by a jury, and that there can be no contrary finding to a verdict of a jury.

The Circuit Court of Appeals in its opinion said:

> "It is obvious in the case at bar that nothing was hidden from appellee, that she was well aware of the slippery and wet condition of the stairway as she started to descend it. She stated that she took hold of the banister as she started down because she realized that there was a possibility of falling. She presumed that her own galoshes were wet as she entered the store, having walked through the slush and snow, and she could see that there was slush and snow on the stairs tracked in by other people. * * * We think the facts as proved by appellee fail to disclose such a lack of reasonable and ordinary care in the maintenance and supervision of the premises as to render appellant liable for her accident."

CONCLUSION.

Neither of the points raised by Petitioner is new or is of such importance as to require review by this Court. Both have been definitely passed upon heretofore.

It is respectfully submitted that the Petition for writ of certiorari be denied.

Respectfully submitted,

CARL E. ABRAHAMSON,
Counsel for Respondent.

BURT A. CROWE,
Of Counsel.

(24)

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940

No. 983

DOROTHY BRUNET,

Petitioner,

vs.

S. S. KRESGE COMPANY, a corporation,

Respondent.

REPLY BRIEF OF PETITIONER IN SUPPORT OF WRIT OF CERTIORARI.

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MAY IT PLEASE THE COURT:

STATEMENT OF FACTS

The petitioner stated the facts and the law of the case at bar clearly in her Petition for Writ of Certiorari and had hoped to avoid the presentation of a Reply Brief. However, in view of the fact that the Respondent's Brief contains definite misstatements as to procedural facts, the petitioner believes that a Reply Brief should be presented to this Honorable Court to call the Court's attention to the true facts in the case.

At the *conclusion of the plaintiff's evidence,* the defend-

ant made a motion for a directed verdict, on which motion the ruling was reserved. At the *end of all of the evidence introduced by both plaintiff and defendant,* the defendant made a motion for a directed verdict, which motion was denied. The case, therefore, went to the jury after the defendant's motion for a directed verdict had been *denied without reservation.*

We quote from page 130 of the Transcript of Record to show to this Honorable Court the true procedural facts of the case:

> "Now comes the defendant, S. S. Kresge Company, a corporation, by Burt A. Crowe, its attorney, at the conclusion of all the evidence offered by the plaintiff in the above entitled cause and moves the court to exclude said evidence and to instruct the jury to find the defendant not guilty as per the written instruction attached hereto.
>
> (Written notation) Ruling Reserved
>
> Burt A. Crowe,
>
> Attorney for Defendant"

* * * * *

> "Now comes the defendant, S. S. Kresge Company, a corporation, by Burt A. Crowe, its attorney, at the conclusion of all the evidence offered by the plaintiff and the defendant in the above entitled cause and moves the Court to exclude said evidence and to instruct the jury to find the defendant not guilty as per the written instruction attached hereto.
>
> Burt A. Crowe,
>
> Attorney for Defendant
>
> (Written notation) Denied."

Thus, the case at bar is identical with the procedural situations presented in the cases of *Slocum* v. *New York Life Insurance Company,* 228 U. S. 364, and *Aetna Insurance Company* v. *Kennedy,* 301 U. S. 389. The facts in the case of *Baltimore & Carolina Line* v. *Redman,* 295 U. S. 654, were entirely different. In that case the court sub-

mitted the facts to the jury and reserved its ruling on the motion for a directed verdict at the close of all the evidence, that is, the case went to the jury with a reservation of the court's ruling on the motions.

Therefore, the Petition for Writ of Certiorari in the case at bar presents a serious question as to the construction of Rule 50(b) of the Federal Rules of Civil Procedure, which problem is still a dilemma to the Federal Courts of the United States, as the petitioner has pointed out in her Petition for Writ of Certiorari and in her Brief in Support of said Petition.

FAILURE TO FOLLOW ERIE RAILROAD COMPANY VS. TOMPKINS

As pointed out in the Petition for Writ of Certiorari and in the Brief in Support Thereof, the facts in the case at bar presented a conflict in the evidence as to the questions of negligence and contributory negligence. The correctness of this statement is admitted by respondent on page 1 of its Brief, wherein the respondent states: "The statement of the matter involved as set out by petitioner in her brief filed herein correctly states the salient facts as to the cause of action herein." The petitioner has pointed out in her Petition for Certiorari and in her Brief in Support Thereof that the Circuit Court of Appeals for the Seventh Circuit, in its decision, did not follow the common law of the State of Illinois as enunciated by the Supreme Court of the State of Illinois, in accordance with the holding of this Honorable Court in the case of *Erie Railroad Company* v. *Tompkins*, 304 U. S. 64. In deciding the questions of negligence and contributory negligence, the Circuit Court of Appeals for the Seventh Circuit has thrown the local law of Illinois into a state of

confusion by following a case which was decided by one of the four Appellate Courts of Illinois instead of following the law as decided by the Supreme Court of Illinois, the highest court of the State. The respondent, in its brief, tries to overcome this contention by showing that the Circuit Court of Appeals, although following the decision of the Appellate Court of Illinois, cites the case of *Calvert* v. *Springfield Light Company,* 231 Ill. 290. We wish to call this Honorable Court's attention to the fact that the *Calvert* case is not at all applicable to the case at bar and that, although the Circuit Court of Appeals cited that case, it did not follow it, but, on the contrary, followed the Appellate Court of Illinois.

The common law of Illinois as promulgated by the Supreme Court of Illinois is stated in the cases of *Illinois Central Railroad Company* v. *Keegan,* 210 Ill. 150, and *Blumb* v. *Getz,* 366 Ill. 273, cited and quoted in the Brief of the Petitioner in Support of the Petition for Writ of Certiorari. These cases and the law announced therein were not followed by the Circuit Court of Appeals for the Seventh Circuit, whose decision in the case at bar was directly contrary to the ruling of this Honorable Court in *Erie Railroad Company* v. *Tompkins,* 304 U. S. 64.

CONCLUSION

It is respectfully submitted that the errors of the Circuit Court of Appeals for the Seventh Circuit, as presented in the Petition for Writ of Certiorari and Brief in Support Thereof and in this Reply Brief, are of such importance as to call for a review and determination of this Honorable Court.

Respectfully submitted,

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